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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

75-17

NO. A-888

JAMES M. SPROUSE, PETITIONER

v.

CLAY COMMUNICATIONS, INC., RESPONDENT

CROSS-PETITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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The petitioner, James M. Sprouse, is satisfied with the judgment of the Supreme Court of Appeals of West Virginia to the extent it affirmed the verdict and judgment of the Circuit Court of Fayette County. The petitioner respectfully prays, however, that a cross-petition to a writ of certiorari issue to review the issues decided adversely to him by the judgment and opinion of the Supreme Court of Appeals entered in this proceeding on February 4, 1975.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia, affirming in part, reversing in part, and remanding with instructions the judgment of the Circuit Court of Fayette County, is reported in 211 S.E.2d 674. The complete opinion is printed as Appendix A to the petition for a writ of certiorari filed by respondent, and the portion of the opinion dealing with punitive damages is printed as Appendix A to this cross-petition.[1]

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on February 4, 1975. By an order of this Court, entered May 2, 1975, the petitioner was granted an extension of time within which to file a cross-petition to the writ of certiorari filed by the respondent to and including July 4, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Whether in a public figure-libel action a State appellate court may alter a jury verdict by deleting all punitive damages "as a matter of Federal constitutional law" upon the theory that an award of compensatory damages effectuates the purposes of punitive damages.

2. Whether the total award of $750,000 [$250,000 in actual damages and $500,000 punitive damages] would have a "chilling effect" upon the legitimate exercise of

[1]The opinion having been so printed, references to the opinion are by page number to the Petitioner's Appendix, designated as "C. App. A, p. 1a," except where such references are to that portion of the opinion printed as Appendix A to this petition. References to the appendix of this cross-petition shall be by page number to the Appendix designated "App. A, p. 1a." References to the Record of Proceedings in the trial court are by page number as "R.1."

First Amendment rights and lead to prohibited self-censorship.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .".

Amendment XIV: ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

The petitioner, James M. Sprouse, an unsuccessful gubernatorial candidate in the 1968 general election in West Virginia, instituted a libel action in the Circuit Court of Fayette County against the respondent. The action was based upon the publication of a series of newspaper articles, appearing two weeks before the election, which accused the petitioner of nefarious conduct in connection with a legitimate land transaction. Those articles, which charge conduct that directly smacks of criminality and corruption, were a part of a scheme or plan between the newspaper and the staff of the opposition candidate and were published with actual knowledge of their falsity and with intent to damage or destroy the petitioner as a viable candidate.

At the trial in the circuit court, the petitioner contended that the articles were published with actual malice, knowledge that they were false or in reckless disregard of truth, and were thus without the protection of First Amendment guarantees. Recovery of actual and punitive damages was sought. The petitioner main-

tained that actual and punitive damages were recoverable by him upon proof of actual malice as defined according to First Amendment guarantees and standards.

The trial culminated in a jury verdict in petitioner's favor in the amount of $250,000 actual or compensatory damages and $500,000 punitive damages. Judgment was duly entered upon the verdict by the trial court.

The issue was raised in the trial court and resolved in favor of the petitioner based upon (a) a demand for punitive damages in the complaint for the wilful and wanton conduct of the respondent (R. 10), (b) Instruction 10 and Instruction 10A, given by the trial court, permitting recovery of such damages upon proof of actual malice (App. B, p. 3a), and (c) a favorable ruling on the issue upon a motion to set aside the verdict (R. 136-37). Upon appeal, the verdict and judgment with reference to actual damages was affirmed, but the award of punitive damages was stricken by the Supreme Court as a matter of Federal constitutional law.

I. The Evidence Adduced at Trial

A. Background of the Publications and Participation of the Moore Aides

In 1968, the petitioner, James M. Sprouse, was the Democratic candidate for Governor of West Virginia. His opponent in that 1968 general election was Arch A. Moore, Jr.

Prior to his candidacy in the 1968 election, Sprouse, as president of Selmet Corporation, a New York corporation formed by the respondent's classmate, acquired an interest in certain acreage in Pendleton County (R. 393, 394). The original purchase, which included less than 2,900 acres, was obtained from Henry Regnery on

March 12, 1966 for $134,620 (R. 192). The purchase culminated a long standing and well-advertised effort by Regnery to sell the land (R. 192, 193). The corporation qualified to do business in West Virginia on August 25, 1966, two years prior to the sale involved and more than two years prior to the publication of the libelous stories by the Daily Mail. Sprouse was listed as president and the principal place of business as 700 Terminal Building, where Sprouse practiced law (R. 469). Outstanding among a number of subsequent out conveyances by Selmet during the ensuing two-year period, was one of 1,385 acres to Nature Conservancy for $81,364 on October 2, 1968 (R. 208). This property was ultimately conveyed to the United States government for its use as a part of a recreation area maintained by the United States Forest Service.

Including this conveyance, the profit to Selmet was approximately $48,176.75, a factor disclosed by public records admittedly examined by Mellace (C. App. A, p. 11a). After these conveyances, and at the time of the publications, only 87.0$ acres of the original tract remained (R. 255).

During this same period, Sprouse signed his name to many, separate deeds which were a matter of public record in the office of the Clerk of the County Court of Pendleton County (R. 207, 469). The total profit to Sprouse, derived from the sale of the entire "Regnery-Selmet" tract was less than $14,000 (R. 411).

Nine months prior to the libelous publications, in early March, 1968, the petitioner, Sprouse, made a public disclosure of his assets, which included his interest in the Pendleton County forest acreage and was valued at $10,000 (R. 459-61). The newspaper's editors freely con-

ceded at trial that there was nothing suspect about the real estate transaction nor Sprouse's participation in it, rather that it was a regular and normal business transaction. This was their opinion, both at the time of publication, and time of trial (R. 330).

On October 14, 1968, William Loy and Norman Yost, the key campaign aides to candidate Moore, visited the offices of the Charleston Daily Mail, a newspaper published by respondent, for the admitted purpose of supplying information of a "suspect" land transaction in Pendleton County, involving the petitioner (R. 283), and the ultimate publication of a news story deleterious to respondent Sprouse (R. 381, 382). Loy and Yost met with Jack Maurice, Vint Jennings and Robert Mellace, all editors and the top officials of the newspaper (R. 555, 556).

Although the newsman was fully aware of the self-interests of the Moore aides (R. 283), Mellace made a trip to Pendleton County with Loy, the chief campaign aide (R. 555, 556). They were met by another Moore aide, Latimer, who transported them to the site of the property (R. 292).

During the visit, Mellace purportedly conducted an "investigation." The "investigation" consisted primarily of information presented by the political aides and an interview with two forest service officials, Oliver and Marshall (R. 292, 297). Oliver did not testify, but Marshall's testimony established actual knowledge by Mellace that some of the information he published was false. Marshall was the official who was acquainted with the details concerning the land (R. 251). According to Marshall, Mellace attempted to have him verify that there was 400 acres of land remaining after the sale, providing

Selmet an additional profit of $400,000 (R. 256). Marshall insisted to Mellace that this was not true and that he showed the editor-reporter (from Forest Service records) that there was less than 100 acres at $500 per acre, for a remaining profit of less than $50,000. Despite this, Mellace's article, which quoted the Forest Service official, indicated that 400 acres remained at $1,000 per acre.

Mellace prepared his article for publication on October 24, 1968. Before publication of the story, a copy was delivered to Norman Yost, media director for Moore's campaign, for distribution to all weekly and daily newspapers for simultaneous publication. Mellace admitted this was unprecedented in the history of the respondent's publishing experience (R. 365).

B. Publications

"It is important that this entire case be viewed against a background of events which occurred in West Virginia during the late 1960's when rather widespread corruption was exposed in State government. This corruption ultimately led to federal prison terms for numerous high-ranking officials, including a former Governor and a former Attorney General of West Virginia." (C. App. A., p. 16a)

West Virginia newspapers for a number of years had highlighted stories of the corruption of State officials. The vehicles of corruption and crime had been repeatedly and dramatically presented as "dummy corporations" formed in Florida and Ohio (R. 325, 427). The dummy corporations were used by these convicted officials as a mechanism for bribery and kickbacks. The convicted officials belonged to the same political party as the petitioner (R. 427).

In view of the widespread public awareness of previous corruption, the inclusion of the false statements in otherwise accurate articles reinforced the implication of improper conduct and logically led to false conclusions.

The first article detailed information concerning the date of incorporation of Selmet and the date legislation was handled in Congress creating a national recreation area. The coincidence of these two events appeared four different times in the publications. The unmistakable implication was of "inside knowledge" by the respondent in connection with the legislation. That this was an obvious and logical conclusion to be drawn is evidenced by the statement of the opposition candidate printed the next day in which he posed a rhetorical question: "Did they have prior knowledge of the Forest Service recommendation that this area of land would be utilized as a portion of the Federal recreation complex plan there? . . . Who was responsible for changing the boundaries . . .? Have any members of this corporation been involved in similar land transactions to the federal government . . .?" (C. App., p. 47a, 48a) The story identified other members of the partnership as officials in the Democratic party, active in the affairs of the United States government.

Another story explained in great detail how the corporation was formed in New York. "There is additional evidence it [Selmet] has never done any business in New York where it was chartered, and where the law permits incorporation by an agent without identifying the incorporators, which is forbidden by West Virginia law." (C. App. A., p. 42a)

These are but examples. A full reading of the articles, in light of the background of corruption previously prov-

en in West Virginia, completely demonstrates that the purpose of the articles was to impress readers that petitioner Sprouse had been engaged in unethical, corrupt and criminal activity.

A similar distortion resulted from the story about Harper and "Seneca Rocks", a tourist attraction some ten miles from the location of Selmet's property, which was owned by the Harper family. (C. App. A., p. 41a) The portrayal of the plight of this farmer and his mistreatment by the United States government was essentially truthful. It was, however, completely unrelated to the Selmet transaction. Yet the text and the headlines implied that the farmer was being taken advantage of by the petitioner and that he was going to fight the "deal" in court. Closely read, the "deal" related to Harper's problem with the government, but the implication of the story was that he was going to fight the petitioner's deal.

In the context of basically true, but cleverly distorted statements, the headlines and sub-headlines conveyed even greater libelous impressions. They were: "Pendleton Realty Bonanza by Jim Sprouse Disclosed;" "Clean-up of Nearly $500,000 in View;" "Fortune to Jim Sprouse, But Pittance for Seneca" (referring to Harper); "Landmark's Owner Plans Court Fight Against Deal."

It is significant that in this series of articles the petitioner twice used huge pictures to convey false facts. The first instance was use of a "cropped" picture run across an entire page. This was a picture of two different areas, "cropped" and fit together to create the appearance of a much larger section of choice land (R. 362). The second instance involved a picture of the "Seneca Rocks" a valuable tourist attraction used in connection with the series

of articles. Underneath the picture of the Rocks was the caption "Where Governor Candidate Cleans Up." This tourist attraction was some ten miles from the Selmet property (R. 216).

The newspaper editors testified that they knew at the time of publication that there was nothing improper involved in the petitioner's corporate land involvement (R. 330). The newspaper interviewed the opposition candidate after printing the first story and, despite their admitted belief in the legitimacy of this transaction, reported the interview under the headline " 'Dummy Firm' Seen Proving Corruption," and "Moore Asks Federal Probe Into Sprouse's Pendleton Land Grab." The text of this story contained such allegations as: ". . . 'Here we have a dummy corporation, set up in the dark of night in the state [sic] of New York. . . . This seems vaguely reminiscent of the Florida corporation scandals of a few months ago. . . . It would appear that this land grab smacks of the same old Statehouse corruption,' Moore said." (C. App. A., p. 46a) The article then included a series of incriminating rhetorical questions addressed to petitioner Sprouse.

Included in this edition was a long, front-page editorial asserting in positive and condemning language that Sprouse's election would result in more of the same corruption that had existed in previous administrations (App. C, p. 5a).

C. Damages

The petitioner not only testified concerning general damages he suffered, but indicated in some detail how damages were inflicted. The petitioner's testimony was

completely uncontradicted either on cross-examination or by the introduction of any defense testimony.

The petitioner testified as to the devastating effect the libels had on him physically and emotionally. He told of the doubts that his campaign aides entertained of his connection with the discredited Barron gang; the letters he received from West Virginians who now felt he was as corrupt as the convicted politicians in Federal Court; the embarrassment he endured having to deny his involvement in corrupt practices to members of his firm, friends and campaign aides; the pain he witnessed on the faces of his wife and children; the suffering of knowing one of his children was physically abused in school and the publications of letters to the editor from former supporters who now defected because of the so-called "disclosure" of corruption (R. 447-453).

In addition to the petitioner's uncontradicted testimony, the evidence clearly reflected the respondent's politically malevolent motivations. The conspiratorial atmosphere presented by the respondent's admitted alliance with the staff of the opposition candidate (R. 283), the undisputed participation of the Moore aides in the "investigation" of the story (R. 292, 555-56), the cooperative effort of the respondent and the Moore staff to insure statewide coverage of the story (R. 365), the repeated use of intentional falsehoods in the stories and their accompanying banner headlines, when balanced against the respondent's admitted belief in the legitimacy of the transaction (R. 330), presented the jury with a legitimate basis for awarding punitive damages.

D. Instructions

The instructions of the trial court to the jury met with every exacting standard laid down by *New York Times* v. *Sullivan.*[2]

Plaintiff's Instruction Nos. 10 and 10a and Defendant's Instruction No. 17 dealt with the recovery of damages, actual and punitive, by the petitioner (App. B, p. 3a). Instruction No. 10a definitively outlined the basis upon which punitive damages could be awarded, requiring a basis of malice as defined according to First Amendment standards, preponderating proof of actual damages and a concomitant finding of the need to punish the defendant as a deterrent to others. As the instruction noted, punitive damages were to be awarded in the discretion of the jury upon a reasonable relationship between such an award and the actual damages proved by the petitioner.

II. The Opinion of the West Virginia Supreme Court of Appeals

On appeal, the Supreme Court of Appeals of West Virginia upheld the verdict and judgment rendered in the Circuit Court of Fayette County insofar as it awarded actual damages of $250,000. In reversing that portion of the judgment awarding punitive damages of $500,000, the Court held that the " . . . penumbra of protection of the First Amendment is such that punitive damages may only be recovered in cases where the award of

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[2]For brevity and convenience of reading, cases shall be referred to by style only. Decisions so handled may be: *New York Times* v. *Sullivan*, 376 U.S. 254, 11 L.Ed. 2d 686, 84 S. Ct. 710 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64, 13 L.Ed. 2d 125, 85 S. Ct. 209 (1964); *Curtis Publishing Co.* v. *Butts*, and *Associated Press* v. *Walker*, 388 U.S. 130, 18 L.Ed. 2d 1094, 87 S. Ct. 1975 (1967); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 19 L.Ed. 2d 248, 88 S. Ct. 197 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727, 20 L.Ed. 2d 262, 88 S. Ct. 1323 (1968); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 29 L.Ed. 2d 296, 91 S. Ct. 1811 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed. 2d 789 (1974).

actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future." (App. A, p. 1a)

Finding that $250,000 was adequate to compensate the petitioner and dissuade others in like circumstances from committing similar acts, the Court reasoned that First Amendment "policy" forecloses any award of punitive damages which might jeopardize the existence of a newspaper (App. A, p. 1a).

Viewing the judgment in its entirety, the Court maintained that it would have a "chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which it has been the object and purpose of the United States Supreme Court to prevent since *New York Times* v. *Sullivan, supra.*" (App. A, p. 2a)

REASONS FOR GRANTING CROSS-PETITION

The opinion of the West Virginia Supreme Court of Appeals, reversing the verdict and judgment of $500,000 punitive damages for libel as a matter of Federal constitutional law, engraphs upon existing First Amendment standards a concomitant principle of law which severely and egregiously invades the province of the jury.

1. This marked departure from the principles and policy of the law of libel, as it was constitutionally defined in *New York Times,* is predicated upon the insufficiency of compensatory damages rather than retributive character of a punitive award. *Gertz* v. *Robert Welch, Inc.* at 300. The premise that an award of $250,000 actual damages is adequate to dissuade publishers from similar wilful and reckless conduct is inconsistent with the *Butts* v. *Curtis Publishing Co.* decision.

The legal theory supporting an award of punitive damages is plainly stated in the opinion of Mr. Justice Harlan in *Butts* v. *Curtis Publishing Co.* at 388 U.S. 130, 161 (1967): "Moreover, punitive damages require a finding of 'ill will' under general libel law and it is not unjust that a publisher be forced to pay for the 'venting of his spleen' in a manner which does not meet even the minimum standards required for constitutional protection."

The standard employed by the trial court imposed upon the jury an element of discretion toward punitive damages upon a finding of the need to punish the respondent as a deterrent to others, which was tempered with the requirement that such an award bear a reasonable relationship, and not be out of proportion to, the award of actual or compensatory damages. The Court in *Butts* held that ". . . misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject, of course, to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury. . . ." *Butts* v. *Curtis Publishing Co.* at 161.

Moreover, the decision in *Gertz* carefully preserves the element of punitive damages for the public figure who falls victim to the intentional false publication of a newspaper. The lower court's reasoning is inapposite to Mr. Justice Powell's definition in *Gertz* where he defines the punitive damages as follows: "They are not compensation for injuries. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Robert Welch, Inc.* at 350.

The jury's award of $500,000 was a manifestation of the shock and outrage at the newspaper's effort to destroy the good name and high reputation that the petitioner unquestionably enjoyed prior to the publication. It is respectfully submitted that none of the reported cases reflect conduct as reprehensible or insidious as that falsely charged by the respondent in its newspaper's stories. The jury exercised its prerogative in this instance and levied a "civil fine" of $500,000 punitive damages, based upon proper and legitimate standards set forth in Instruction No. 10a. The lower court's decision in this regard resulted in an unwarranted and legally untenable usurpation of the jury's province, resulting in a retrospective appellate standard of punitive damages.

2. The Court's concern that the punitive award might have a "chilling effect" on a newspaper that engaged in a carefully planned scheme to intentionally publish known falsehood about the petitioner is unwarranted. The respondent's news stories were examples of the most reprehensible conduct and fall within that category of utterances which " . . . are no essential part of any exposition of ideas, and are of such slight social value as they a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire* at 572.

The respondent's newspaper made scurrilous charges, akin to those of the *Butts* decision, involving the alleged conduct of an illicit corporate nature resulting in a bonanza to the petitioner. Petitioner's $750,000 verdict, an inflationary decade later than the $460,000 *Butts* verdict, is not so dissimilar in amount, nor such a shocking

amount by the standards of the 70's, as to require the elimination of the punitive damage award for the reasons advanced by the lower court.

CONCLUSION

While the issue of actual malice has been properly adjudicated within constitutional limitations, the action of the Supreme Court of Appeals in striking the award of punitive damages as a matter of Federal constitutional law and First Amendment "policy" is unwarranted and constitutionally impermissible.

Respectfully submitted,

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APPENDIX A

II

The Court agrees with the defendant's contention that the jury award of $250,000 actual damages and $500,000 punitive damages is excessive. Under the recent U. S. Supreme Court case of *Gertz* v. *Welch, supra,* it is permissible for a plaintiff in the position of Sprouse to recover punitive damages because of the high standard of proof required of a candidate for public office to sustain any action for libel. As it is necessary for a candidate for office to prove that false or misleading statements were published with knowledge on the part of the publisher of their falsity or with willful and reckless disregard of their truth, and further to prove that they were published with a deliberate intent to injure, punitive damages may be recovered.

However, regardless of the law of this State, it would appear that the penumbra of protection of the First Amendment is such that punitive damages may only be recovered in cases where the award of actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future. The policy embodied in the First Amendment of encouraging broad dissemination of public information forecloses an award of punitive damages which might jeopardize the existence of a newspaper when such damages are unnecessary to protect the public from similar conduct in the future or to make possible the vindication of plaintiff's rights in the absence of demonstrable actual damages. In the case at bar the Court is of the opinion that an award of $250,000 actual damages is adequate for the purpose of dissuading publishers from similar willful and reckless conduct in the future. In addition the Court is persuaded that an

award of $750,000 would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which it has been the object and purpose of the United States Supreme Court to prevent since *New York Times* v. *Sullivan, supra.*

In viewing all of the evidence the Court is of the opinion that the plaintiff proved $250,000 in actual damages. The case of *Gertz* v. *Welch* specifically recognizes that actual loss to a plaintiff in a libel action is difficult to prove in the same mathematical way that medical expenses or lost earnings can be proven in an ordinary tort action. Mr. Justice Powell specifically says in *Gertz*, 418 U.S. at 350:

> "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

Under West Virginia law in an action to recover for an intentional tort, as opposed to a negligent tort, a plaintiff is entitled to have such elements as mental anguish, insult, indignity, and humiliation considered by the jury in arriving at an award for actual damages. *Addair* v. *Huffman*, ... W. Va. ....., 195 S.E.2d 739 (1973).

The job of determining such intangible and subjective damages as personal humiliation, mental anguish, and indignity has always been the exclusive province of the jury subject to the gentle rule that awards in these areas not be excessive. In light of the amount of jury awards

for pain and suffering which are routinely sustained by appellate courts in tort actions involving physical injury, and considering the rank and station in life of the plaintiff at the time of publication, this Court finds that the award of $250,000 actual damages was not excessive.

APPENDIX B

Plaintiff's Instruction No. 10

[Given as amended by the trial court]

The Court instructs the jury that if you find for the plaintiff, James M. Sprouse, in estimating the damages, you may take into consideration the extent of the circulation given to the articles published in the defendant's newspaper, the rank, standing, and position of the plaintiff, James M. Sprouse, at the time of the publication, any injury to his fame and reputation, the grief, anguish, mental suffering, mortification, and humiliation which the plaintiff has undergone and suffered by reason of the articles; if you believe from the evidence that his fame and reputation were injured and that he did suffer grief, anguish, mental suffering, mortification, or humuliation, then you may award to the plaintiff such compensatory or actual damages as you find from the evidence the plaintiff has suffered or that it is reasonably certain he will suffer in the future by reason of said publications, not exceeding the amount of compensatory damages demanded in the complaint.

Instruction No. 10a

[Given as amended by the trial court]

If under the law and the evidence the jury be warranted in returning its verdict for the Plaintiff, James M. Sprouse, and if the jury further finds from preponderat-

ing evidence that the said Plaintiff has suffered damages, then they may return a verdict for such damages in such an amount as they find will justly compensate the said Plaintiff, James M. Sprouse.

In the event the jury finds that the Defendant should be punished, and as a deterrent to others, it is within the discretion of the jury to award punitive damages in the event the amount of the jury's compensatory award is not, in the jury's judgment, adequate to punish the Defendant and to deter others. Such punitive damages, if any, must bear a reasonable relationship and not be out of proportion to the actual damages, if any; taking into consideration the wealth of the Defendant.

DEFENDANT'S INSTRUCTION NO. 17

[Given as Amended by the Trial Court]

The Court instructs the jury that the plaintiff, Sprouse, has the burden of proving by a preponderance of the evidence that he has, in fact, been damaged by reason of and as a proximate result of the publication of the article in defendant's newspaper, and if the plaintiff fails to prove by a preponderance of the evidence that he has been damaged as a proximate result of the publication, then you may return a verdict for the defendant.

APPENDIX C

Editorial Printed In The

Charleston Daily Mail

Friday Evening, October 25, 1968

An Editorial

MORE OF THE SHABBY SAME, OR SOME CLEANSING CHANGE?

The issue facing thoughtful West Virginians in 1968 is only incidentally a contest between Arch Moore and James Sprouse, the two candidates for governor.

Only in the formal sense, through the mechanics provided by the two-party system, is it a contest between Republicans and Democrats.

The issue is starkly and simply this:

More of the same? Or some hope of a cleansing and reviving change?

And on the sameness of this issue, thoughtful and concerned West Virginians cannot easily deceive themselves. The rumors to which West Virginians have long been accustomed have been swept away by indictment and conviction.

The record in Federal District Court speaks louder than all the campaign rhetoric, and it strips away the pretentions of years. While West Virginians have been paying more and more for more and more government, they have been getting an indigestible helping of scandal, corruption, deception and betrayal in their public service.

How deep and wide it spread almost no one knows. What is known for sure is this:

It reached into the uppermost echelons of the executive establishment, even into the office of Governor.

It went undetected, unexposed and unpunished for years, the whole of the apparatus for government turning a blind eye and a dead nose on the mess.

And it took the federal government, and the state government to pull the plug.

What West Virginians know now about the creeping immorality and organized plunder in their public life, they know because Washington acted, Charleston did not.

This is the indictment now brought against the statehouse and the forces which have held it as their private preserve for so long. It is an indictment not only of the few who got caught, but of the many who sat it out, unsuspecting, indifferent, mute and ineffective.

More of the same?

This is what is offered by the Sprouse candidacy and

the rest of the Democratic ticket. It is a little like asking the horses to clean their own barn.

The alternative—and the only alternative:

GOVERNOR
ARCH A. MOORE, JR.

SECRETARY OF STATE
JOHN S. CALLEBS

ATTORNEY GENERAL
CHARLES H. HADEN, II

AUDITOR
ROBERT R. COCHRANE

TREASURER
J. KENTON LAMBERT

COMMISSIONER OF AGRICULTURE
EDWARD T. WHITE

[redacted]

[redacted]

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-17

JAMES M. SPROUSE, *Petitioner*

v.

CLAY COMMUNICATIONS, INC., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO CROSS-PETITION OF PETITIONER

This cross-petition for a writ of certiorari was filed by James M. Sprouse (hereafter "Sprouse"), petitioner herein and respondent in Docket No. 74-1384, seeking review of the judgment and opinion of the Supreme Court of Appeals of West Virginia entered on February 4, 1975, insofar as it reversed a $500,000 punitive damage award to Sprouse in the trial court. There is also pending in this Court Docket No. 74-1384, which is a petition for writ of certiorari filed by respondent herein, Clay Communications, Inc., (hereafter "Clay") seeking review of the issues decided adversely to it by the judgment and opinion of the Supreme Court of

Appeals. Also filed in Docket No. 74-1384 are a brief in opposition by Sprouse and a reply by Clay. To avoid unnecessary duplication and repetition, reference will be made in this brief in opposition to the documents filed by the parties in Docket No. 74-1384.[1]

OPINION BELOW

The complete opinion of the West Virginia Supreme Court of Appeals is reported at 211 S.E.2d 764, and it attached as Appendix A to the petition. The portion of the opinion of the court below dealing with punitive damages appears at pp. 28a and 29a of Appendix A to the petition and in Appendix A to the cross-petition.

QUESTION PRESENTED

Whether this Court should review a decision by a state appellate court in a libel action by an unsuccessful gubernatorial candidate setting aside a punitive award of $500,000, when such state court holds that the punitive damage award is excessive in that (1) the actual damage award of $250,000 is sufficient to dissuade others in like circumstances from committing similar acts in the future and (2) "an award of $750,000 would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which it has been the object and purpose" of this Court to prevent.

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[1] For convenience of reference to documents filed in Docket No. 74-1384, the petition for a writ of certiorari filed in that case by Clay shall be referred to herein as the "petition"; the brief in opposition filed in that case by Sprouse shall be referred to as "Sprouse brief in opposition"; and the reply to the Sprouse brief in opposition shall be referred to herein as the "Clay reply." The cross-petition filed in this Docket No. 75-17 by Sprouse shall be referred to herein as "cross-petition."

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions (Amendment I and Amendment XIV) are set forth in the cross-petition at page 3.

STATEMENT OF THE CASE

The statement of the case in the cross-petition, appearing at pages 3 through 11, is identical to the statement of the case in the Sprouse brief in opposition, except for the second full paragraph on page 4 and the last paragraph on page 11, and contains assertions which are either (a) not supported by the record or (b) involve an issue on which evidence was conflicting and which was resolved in favor of Clay by the Supreme Court of Appeals of West Virginia. Some of the patently false or misleading assertions made by Sprouse in his brief in opposition, and repeated in the cross-petition, are pointed out in the Clay reply, pages 1 through 4, which together with the statement of the case in the petition in Docket No. 74-1384 are incorporated herein by reference.

ARGUMENT

The opinion of the West Virginia Supreme Court of Appeals, insofar as it reversed the verdict and judgment of $500,000 punitive damages, is clearly correct, both under State and Federal law, and such reversal does not warrant review by this Court.

The court below held that the aggregate award of $750,000 in compensatory and punitive damages was excessive (Appendix A to the petition, pp. 28a and 29a) in that the $250,000 compensatory award was sufficient to punish Clay and to dissuade others from committing similar acts and the additional $500,000

punitive award would have a "chilling effect" upon First Amendment rights and would lead to self-censorship.

The decision below is consistent with West Virginia law regarding punitive damages. In *Spencer* v. *Steinbrecker,* 152 W. Va. 490, 164 S.E.2d 710 (1968), which was not a First Amendment case, it was held that an instruction on punitive damages should read as follows:

> "Punitive or exemplary damages are damages which together with and in reasonable proportion to the amount of compensatory damages will punish the defendant and in the judgment of the jury be sufficient to deter others from engaging in like course of conduct."

Sprouse Instruction No. 10A (cross-petition App. B, pp. 3a, 4a) as given by the trial court conforms to the holdings in *Spencer* v. *Steinbrecker, supra,* and instructed the jury that it could return a verdict for punitive damages only if its compensatory award was not adequate to punish the defendant and to deter others. Although the opinion of the court below is couched in First Amendment language, the standard applied would be applicable in West Virginia even in a non First Amendment context.

This Court has most recently recognized the danger inherent to First Amendment freedoms resulting from "uncontrolled discretion of juries to award damages" in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974). See also the dissenting opinion of Justice Marshall, in which Justice Stewart joined, in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971) and Justice Harlan's dissenting opinion in that case. The cross-petition's

reliance upon the plurality opinion of Justice Harlan in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), will not stand scrutiny. In *Butts, supra,* at page 160, Mr. Justice Harlan stated:

> "We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted."

In *Butts* this Court was clearly citing with approval the action of the trial court in reducing the punitive award granted by the jury to Mr. Butts from $3,000,000 to $400,000.[2] The court below exercised that very type of judicial control which this Court approved in *Butts.* In this case the net worth of Clay was $3,500,000 and the trial court so instructed the jury.[3] The compensatory award of $250,000 and the punitive award of $500,000 aggregated more than 21% of the net worth of Clay.

Sprouse heavily predicates his argument upon the relative sizes of the total compensatory and punitive awards in *Butts* and in this instant case. The record in *Butts* reflects an award of $60,000 in compensatory damages and $400,000 in punitive damages. Sprouse immediately compares that total award of $460,000 with the total jury award in this case of $750,000 and reasons that they are approximately the same because of the inflation which has taken place between the early 1960's and the present date. Therefore, Sprouse con-

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[2] 255 F.Supp. 916 (1964).

[3] R. 719.

cludes that the amount of the jury award in this case is supported by the award of $460,000 in *Butts*. This argument is fallacious in the extreme. The trial court in *Butts* ordered a remittitur from the $3,000,000 jury punitive damage award to $400,000. This remittitur was upheld by the United States Court of Appeals for the 5th Circuit[4] as a proper exercise of discretion. There the Court of Appeals stated, at page 718, that the trial judge had a duty to determine whether as a matter of law the verdict comports with law. In addition, while Clay had a net worth of 3.5 million dollars, Curtis Publishing Company had a net worth as of December 31, 1962, of $27,932,000.[5] Sprouse totally overlooks the net worth of Curtis Publishing Company in arguing that the reduced award in *Butts* supports the amount of the jury award in the instant case. In fact, the contrary is true and *Butts* fully supports the judicial control exercised by the court below in finding as a matter of law that Clay's First Amendment rights would be seriously jeopardized by the excessive jury award of $750,000. The $250,000 award left standing by the court below is actually a substantially greater proportion of Clay's net worth than the $460,000 award was to the net worth of Curtis Publishing Company.

CONCLUSION

Although the action of the court below in reversing the punitive damage award of $500,000 was patently correct and does not require review by this Court, nothing herein should be construed as a retreat by Clay Communications, Inc. from the position taken by

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[4] 351 F.2d 702 (1965).

[5] Moody's Industrial Manual—American & Foreign, 1963 Ed., P. 1273.

it in its Petition (Docket No. 74-1384) requesting review and reversal of the judgment below as violative of its First Amendment guarantee of a free press. Accordingly, it is respectfully urged that the instant cross-petition be denied and again respectfully urged that the petition of Clay Communications, Inc. in Docket No. 74-1384 be granted.

Respectfully submitted,

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